IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1381

EGAN OLDENDORF,

Petitioner,

vs.

BENITO LOPEZ, INTERNATIONAL TERMINAL OPERATING CO., INC., AND HOFFMAN RIGGING AND CRANE SERVICE, INC.

Respondents.

PETITIONER'S REPLY TO RESPONDENT INTERNATIONAL TERMINAL OPERATING CO., INC.'S BRIEF IN OPPOSITION

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This reply brief is being submitted because respondent, International Terminal Operating Co., Inc. is less than candid when it asserts in its brief that in the Court of Appeals it argued contribution as a defense to the award of indemnity to petitioner and that that issue was in fact raised, briefed and argued.

At page 3 of its brief, it is stated:

> "In its appeal to the Court of Appeals ITO argued, among other things, • • • that under controlling law neither Oldendorf nor Hoffman could recover contribution from ITO as the District Court had permitted. • • •"

It is to be noted that the first of the questions presented in the petition for a writ is inaccurate as the

legal issues on which the Court of Appeals decided the case were in fact raised, briefed and argued."

According to ITO's brief, contribution was presented as an issue only on the award to Hoffman (A 24-25).

In "The Course of Proceedings and Disposition In the Court Below", ITO states that the Court below held that ITO "was obligated to indemnify Oldendorf" (A 26) and that since Hoffman was negligent it "was also obligated to indemnify Oldendorf" (A 27).

According to ITO's brief, the subject matter of Point II was: "It Was Error To Grant Hoffman Contribution From ITO" (A 28). In the argument under Point II, it was urged: "It was error as a matter of law for the Court below to award Hoffman contribution from ITO" (A 29); "It was clearly legal error for the Court below to award Hoffman 50% contribution from ITO, and that part of the judgment should be reversed" (A 30); and Point II was concluded with the statement: "Accordingly, it was error for the Court below to award Hoffman a contribution of 50%" (A 30).

Nor do any of the alternatives set forth in ITO's conclusion even suggest that the award to petitioner against ITO should be set aside because it represented contribution and not indemnity (A 31-A 33).

CONCLUSION

The petition for a writ of certiorari should therefore be granted because the issue of contribution was not raised, briefed or argued as to the award to petitioner.

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

The Issues on Appeal

By this appeal the third party defendant-appellant, INTERNATIONAL TERMINAL OPERATING CO., INC. (hereinafter ITO) presents the following issues for review by this Court:

1. The plaintiff, an injured longshoreman who was in the employ of ITO, recovered judgment from EGAN OLDENDORF (hereinafter SHIPOWNER) solely on the basis of that SHIPOWNER's negligence. Notwithstanding that the SHIPOWNER's liability was based solely upon its own negligence, the Court below invoked an implied warranty of workmanlike service from ITO so as to require it to indemnify such negligent SHIPOWNER merely because the plaintiff had been found 15% contributorily negligent. We submit that under decided law an implied warranty of workmanlike service is not invoked to benefit a shipowner liable solely for its own negligence.

2. The plaintiff also obtained judgment against HOFFMAN RIGGING AND CRANE SERVICE, INC. (hereinafter HOFFMAN) for its negligence in operating a crane that was discharging cargo at the time of the accident. The Court awarded HOFFMAN 50% contribution from ITO notwithstanding that HOFFMAN had made no such claim against ITO in that action, and notwithstanding that the law quite clearly holds that an employer, such as ITO, paying compensation under the Longshoremen's and Harbor Workers' Compensation Act is not suable for contribution.

3. The only finding of fault on the part of ITO by the Court below was that it was vicariously responsible

for the plaintiff's 15% contributory negligence. The Court also found the accident was caused by the primary negligence of HOFFMAN in the operation of its crane. Nonetheless, the Court dismissed ITO's cross claim against HOFFMAN for indemnity and contribution, and we submit that such dismissal was error.

The Nature of the Case

This is an action brought by a longshoreman, BENITO LOPEZ, to recover damages for personal injuries sustained by him on October 21, 1968 while working in the #1 hatch of the M/V JOBST OLDENDORF, a vessel owned by the defendant and third party plaintiff, EGAN OLDENDORF. LOPEZ made claim against OLDENDORF for both unseaworthiness and negligence.

OLDENDORF in turn impleaded both ITO (the stevedore employer of LOPEZ) and HOFFMAN RIGGING & CRANE SERVICE, INC., the owner and operator of the shoreside crane that was actually hoisting and dragging the cargo of steel beams being discharged at the time of the accident; and it sought indemnity from both of them.

HOFFMAN and ITO each cross claimed against the other seeking both indemnity and contribution.

During the course of the trial LOPEZ was permitted to amend his complaint so as to sue HOFFMAN directly for its negligence in causing the accident.

The Course of Proceedings and Disposition In the Court Below

The action by LOPEZ against OLDENDORF was tried to a jury. By agreement between counsel (15a)* all claims and issues between OLDENDORF, ITO and HOFFMAN were tried solely to the Court. The action by LOPEZ against HOFFMAN was also tried to the Court. Counsel for all parties participated in the jury trial of the LOPEZ action against OLDENDORF.

In connection with LOPEZ' action against OLDENDORF, the jury returned a special verdict (218a-220a) holding as follows:

1. That LOPEZ failed to establish his claim of unseaworthiness against OLDENDORF.
2. That LOPEZ did establish his claim of negligence against OLDENDORF.
3. That LOPEZ' total damages amount to $365,000.
4. That LOPEZ was 15% contributorily negligent.

Deducting LOPEZ' 15% contributory negligence from his total damages left him with a recovery against OLDENDORF in the amount of $310,250 and judgment for such amount was entered (311a-313a).

Solely on account of the jury finding that LOPEZ had been 15% contributorily negligent in failing to take shelter as the draft was being discharged, the Court held that ITO had thereby breached a warranty of workmanlike service to OLDENDORF and was obligated to indemnify OLDENDORF (230a). By reason of the undisputed and,

* Unless otherwise indicated, all references are to the Joint Appendix.

indeed, admitted proof that HOFFMAN had caused the accident by topping the boom of its crane without receiving a signal to do so, the Court held that HOFFMAN was negligent and was also obligated to indemnify OLDENDORF. That same negligence on the part of HOFFMAN entitled LOPEZ to recover directly against HOFFMAN on his negligence action against HOFFMAN (300a), and the judgment entered awarded plaintiff a recovery of $310,250 against OLDENDORF and HOFFMAN, jointly and severally (312a).

The Court then dismissed ITO's cross claim against HOFFMAN for indemnity or contribution (309a).

The Court did, however, grant HOFFMAN 50% recovery from ITO in the event that HOFFMAN paid the judgment of $310,250 obtained against it by LOPEZ, *notwithstanding the fact that in such direct action by LOPEZ against HOFFMAN there had been no claim whatever asserted by HOFFMAN against ITO.*

Statement of Relevant Facts

The accident forming the basis of this lawsuit occurred at approximately 8:17 A.M. on October 21, 1968 in the #1 hold of the M/V JOBST OLDENDORF where the work taking place was the discharge of a cargo of steel beams (17a-18a). A shoreside crane owned and operated by HOFFMAN was being used to discharge the steel beams rather than the vessel's equipment (33a-34a). The vessel was tied up with her portside inshore and her starboard side offshore (26a).

The HOFFMAN crane had controls which permitted its operator to move the boom either up or down or from side to side (73a). It also had controls to permit the

sisted of continuing the stevedoring operation knowing that a boom was improperly positioned and without waiting for the boom to be repositioned. That case did not involve a stevedore who was only vicariously at fault because of the imputed contributory negligence of a plaintiff longshoreman who failed to take a place of safety. In view of the facts of that case, the equities lay with the shipowner and the Court found that case factually distinguishable from the *Schwartz* case, *supra*, which it did not overrule.

Consideration of the underlying rationale for the judicial invocation of an implied warranty of indemnity shows that in accordance with the almost unanimous judicial thinking and writing on the subject the SHIPOWNER in the instant case is entitled to no such equitable relief. It was thus error for the Court below to enter judgment requiring ITO to indemnify the SHIPOWNER for the SHIPOWNER's own negligence merely because this plaintiff was found to be 15% contributorily negligent in failing to take a place of safety.

POINT II

It Was Error to Grant Hoffman Contribution From ITO.

Since the SHIPOWNER in the jury action and HOFFMAN in the non-jury action were each held liable to the plaintiff for negligence, the judgment entered herein in favor of the plaintiff (312a) is directly against both the SHIPOWNER and HOFFMAN, jointly and severally. Said judgment then provides (312a-313a):

> "ORDERED and ADJUDGED that the defendant HOFFMAN RIGGING & CRANE SERVICE, INC.,

> if it pays the judgment herein, recover of the third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., the sum of $155,125.00 together with interest thereon and one half the sum to be taxed as costs in favor of the plaintiff, BENITO LOPEZ, against said defendant, * * *".

It was error as a matter of law for the Court below to award HOFFMAN contribution from ITO.

It should be noted initially that in the plaintiff's direct non-jury action against HOFFMAN the pleadings consisted solely of an amended complaint (7a) and HOFFMAN's answer thereto (11a). *Examination of HOFFMAN's aforesaid answer shows that HOFFMAN made no claim against ITO for either contribution or anything else.* Nor did HOFFMAN in plaintiff's direct action against it, serve any other pleadings making claim against ITO for contribution or anything else. Thus, the Court below granted HOFFMAN a recovery for a claim not made.

Not only was no such claim for contribution advanced in any pleading by HOFFMAN, but no such claim exists in law. As earlier indicated, plaintiff was a longshoreman in the employ of ITO which furnished him with the benefits required by the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C. §§ 901 et seq. Accordingly, ITO is not subject to a claim for contribution, *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), 72 S. Ct. 277.

An employer's immunity to a claim for contribution by reason of the Longshoremen's and Harbor Workers' Compensation Act was again recognized and reaffirmed in *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company*, 406 U.S. 34 (1972), 92 S. Ct. 1550, affirming 442 F. 2d 694 (2 Cir. 1971).

When the same question was most recently considered in *Cooper Stevedoring Company, Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106 (1974), 94 S. Ct. 2174 the factors giving rise to the *Halcyon* decision were found to still have force, and the Supreme Court stated that the limitation-of-liability provisions of the *Longshoremen's and Harbor Workers' Compensation Act* protected the employer from a claim for contribution. As *Cooper Stevedoring, supra,* clearly indicates, although maritime law permits contribution between joint tortfeasors, an exception to that rule exists in favor of a compensation paying employer. It was clearly legal error for the Court below to award HOFFMAN 50% contribution from ITO, and that part of the judgment should be reversed.

Manifestly, if notwithstanding the foregoing, this Court should be of the view that HOFFMAN may obtain and is entitled to contribution from ITO herein, then such contribution must be in proportion to the relative degree of fault of both those parties, *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), 95 S. Ct. 1708. A 50% contribution is not proportionate.

The so-called "fault" on the part of ITO is purely vicarious and stems from the jury finding that plaintiff was 15% contributorily negligent. The fault of HOFFMAN, on the other hand, is for the improper topping of the crane boom without signal to do so, which caused the draft to drag over the other cargo in the hatch and a beam therefrom to topple onto plaintiff's leg. In any apportionment of damages in relationship to fault, it would seem evident that ITO's share should not exceed 15%, since that was the entire amount of the plaintiff's negligence that was imputed to it. Accordingly, it was error for the Court below to award HOFFMAN a contribution of 50%.

vicarious, it follows that ITO should recover contribution against the primary and affirmative wrongdoer, HOFFMAN, so that the entire recovery over by the SHIPOWNER against ITO and HOFFMAN is apportioned not more than 15% to ITO and not less than 85% to HOFFMAN. It was error for the Court below to dismiss ITO's claim for contribution against HOFFMAN.

CONCLUSION

(1) Plaintiff has obtained a judgment, jointly and severally against both the SHIPOWNER and HOFFMAN. If on SHIPOWNER's appeal that judgment is reversed as to it and the action against it is dismissed, then plaintiff has a judgment solely against HOFFMAN.

In plaintiff's direct action against HOFFMAN, it did not make claim against ITO for contribution, and it cannot legally make such a claim. Accordingly, the judgment granting HOFFMAN 50% contribution from ITO must be reversed. The end result of that situation would be that HOFFMAN is solely liable for payment of the plaintiff's recovery. As the plaintiff's recovery has already been reduced by plaintiff's 15% contributory negligence, HOFFMAN would really be responding solely for the amount of its own fault. Such a disposition of this matter would be completely fair and equitable and should commend itself to this Court which in applying the law of Admiralty is in effect acting as a court of equity.

(2) If this Court should deny the SHIPOWNER's appeal and let the judgment against it stand, consideration must then be given both to the SHIPOWNER's indemnity action against ITO and HOFFMAN, and to ITO's cross claims against HOFFMAN. If the judgment against the

SHIPOWNER based upon the verdict of its negligence is not reversed and dismissed, then SHIPOWNER is not entitled to recover indemnity from ITO. There is no equitable reason whatever for a Court to invoke an implied warranty of workmanlike service to benefit a shipowner liable for its own negligence. As this SHIPOWNER was liable solely for its own negligence, no implied warranty of indemnity from ITO is to be invoked. Without such an implied warranty, ITO is not cast into any liability by reason of plaintiff's contributory negligence.

In this situation, both the SHIPOWNER and HOFFMAN are left ultimately liable for the plaintiff's recovery which has already been reduced to the extent of plaintiff's contributing fault. Whether such liability should be divided equally between them, or whether it should be apportioned on contribution principles so that HOFFMAN pays more than the SHIPOWNER, is a matter on which we express no opinion. However, for two negligent parties such as SHIPOWNER and HOFFMAN to be required to pay in proportion to their respective fault the plaintiff's reduced recovery would also be an equitable result which should commend itself to this Court if it denies SHIPOWNER's appeal.

(3) If both the SHIPOWNER and HOFFMAN are liable to the plaintiff, and if the SHIPOWNER is then granted indemnity against both ITO and HOFFMAN, the judgment dismissing ITO's cross claims for indemnity or contribution from HOFFMAN is in error and should be reversed. Only vicariously liable for the imputed 15% contributory negligence of the plaintiff, ITO is entitled to full indemnity from the primary and affirmative tortfeasor, HOFFMAN. The end result of such situation would be that HOFFMAN is required to ultimately pay the plaintiff's reduced recovery, which is again a fair and equitable result herein.

If ITO is not granted indemnity from HOFFMAN, then the recovery over by the SHIPOWNER against both ITO and HOFFMAN should be apportioned so that ITO is required to pay no more than the 15% contributory negligence imputed to it, and HOFFMAN is required to pay at least 85%. This would result in making ITO an ultimate payor of up to 15% of plaintiff's recovery and making HOFFMAN an ultimate payor of at least 85% of plaintiff's recovery. This is neither as fair nor as equitable a result as the others posited above, but is certainly preferable to the present situation whereby ITO is required to pay a full 50% of the recovery.

Respectfully submitted,

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